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IN THE

Supreme Court of the United States

THYSSEN, INC.,

Petitioner,

—v.—

M/V MARKOS N, Official Number 8997, her engines, boilers, tackle, equipment, appurtenances, etc., *in rem*, and Calypso Shipping Corp., S.A. and A.M. Nomikos & Son (U.K.) Ltd., ~~*in personam*~~,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is an Admiralty case which addresses the continued viability of maritime *in rem* actions in the context of foreign arbitration clauses contained in shipping documents, and the right to demand arbitration of an *in rem* claim in a foreign forum which does not recognize such *in rem* actions and was not invoked until after the foreign statute of limitations had expired. The circumstances of this case present a conflict between the Federal Arbitration Act ("FAA"), 9 U.S.C. § 8, and the *in rem* rights and remedies available to cargo claimants under the general maritime law and the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. § 1303(8).

The Second Circuit held in this case that a demand for foreign arbitration of Petitioner's *in rem* claim was timely even though not included in Respondent's pleadings, and was not even raised until the time to commence the arbitration had expired in the foreign jurisdiction. Even though the Court determined that the demand for foreign arbitration was timely, the foreign forum ruled the companion *in personam* claim was untimely under English law. The Second Circuit merged the stayed *in rem* action with the time-barred *in personam* foreign action and dismissed the complaint thereby improperly relinquishing its jurisdiction over the separate *in rem* claim.

The questions presented are whether a timely commenced *in rem* claim can nevertheless be dismissed as time-barred when a foreign arbitration forum that does not recognize such *in rem* remedies dismisses the companion *in personam* action for time-bar where the demand for arbitration was not pleaded or raised before expiration of the foreign statute of limitations, and whether such a result violates COGSA's prohibition against clauses that relieve the ship of liability.

CORPORATE DISCLOSURE STATEMENT

Petitioner Thyssen Inc. states that the following are parent corporations:

Thyssen Krupp A.G.

and publicly held corporations owning 10% or more of plaintiff's stock:

Thyssen Krupp A.G.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit dated September 26, 2002, is set forth in the Appendix, p. 1a (310 F.3d 102; 2002 U.S. App. LEXIS 20459). The opinions of the United States District Court for the Southern District of New York dated August 12, 1999 (1999 WL 619634, 1999 AMC 2515), and dated August 7, 2001 (2001 U.S. Dist. LEXIS 11560) are set forth in the Appendix.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Second Circuit issued its Decision in this case on September 26, 2002. This Petition was timely filed.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

46 U.S.C. App. § 1303(8) of COGSA, provides:

> "8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this section or lessening such liability otherwise than as provided

in this chapter, shall be null and void and of no effect."

9 U.S.C. § 8 of FAA, provides:

"§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

STATEMENT OF THE CASE

Procedural History:

On March 5, 1997, the Petitioner filed a complaint in the United States District Court for the Southern District of Texas, against the M.V. Markos N *in rem*, naming the vessel owner, Calypso Shipping Corp., S.A., and the vessel manager, A.M. Nomikos & Son (U.K.) Ltd. In August 1997, the action was transferred to the Southern District of New York.

On March 11, 1998, a Claim of Owner and an Answer were filed on behalf of the Respondent vessel.

On August 12, 1999, the District Court denied cross-motions for partial summary judgment, and granted Respondent's motion to stay the action pending arbitration in London, and ordered Petitioner to arbitrate its claim. After the English Commercial Court ruled that

Petitioner's claim was time-barred, the District Court granted Respondent's motion to dismiss the complaint in its Opinion and Order entered August 10, 2001, including the *in rem* claim.

The Petitioner appealed to the Court of Appeals for the Second Circuit. The Second Circuit affirmed the District Court's decision on September 26, 2002.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of Facts:

Petitioner filed this *in rem* Admiralty suit and arrested the M.V. Markos N when the vessel called at the Port of Houston. Petitioner accepted a Letter of Undertaking from the vessel's insurers in the amount of $600,000 to release the vessel from arrest. Nearly two years later, Respondent moved to stay the lawsuit based upon a London arbitration clause contained in a charter party incorporated by reference in the bills of lading issued for transportation of the cargo.

After granting Respondent's motion the question of time-bar of the arbitration proceeding was presented to the Commercial Court in London which ruled the claim time-barred. Respondent then moved to dismiss the Complaint and the *in rem* action based upon the time-bar ruling of the Commercial Court. The District Court granted the dismissal over Petitioner's objections that the *in rem* claim could not be adjudicated by a London arbitrator, that the time-bar ruling was solely as to Calypso Shipping, *in personam*, and that to bar the timely commenced *in rem* claim because the *in personam* claim in arbitration was time-barred, violated COGSA § 1303(8) which prohibits any clause or term of a bill of

lading that relieves the ship from liability for cargo damage.

The Second Circuit affirmed the District Court's ruling over Petitioner's objection that the extinguishment of the *in rem* claim violated COGSA § 1303(8), that London arbitrators had no jurisdiction over the *in rem* claim so that the ruling on the *in personam* claim had no *res judicata* affect on the *in rem* claim, and that Respondent had waived arbitration by failing to raise arbitration in its pleading and waiting until the statute of limitations had passed on the arbitration claim.

REASONS FOR GRANTING THE WRIT

The Petition should be granted to resolve a conflict between the Federal Arbitration Act ("FAA"), 9 U.S.C. § 8, and the *in rem* rights and remedies available to cargo claimants under the general maritime law and the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. § 1303(8). The FAA preserves the right of a cargo claimant to pursue *in rem* remedies against a vessel which are then stayed pending arbitration of companion *in personam* claims. COGSA prohibits inclusion of any clause or term in a bill of lading that lessens or relieves the ship *in rem* from liability. Here, the result was extinguishment of the properly and timely commenced *in rem* claim because a belated demand for foreign arbitration involving an *in personam* claim was made when the claim was already time-barred.

Recognition of the unique and traditional *in rem* rights and remedies under U.S. maritime law will preserve such claims when foreign forums bar the companion *in personam* claim on procedural grounds.

I. DISMISSAL OF THE *IN REM* CLAIM BY THE LOWER COURTS DEPRIVED PETITIONER OF A REMEDY FOR ITS *IN REM* RIGHTS AGAINST THE M.V. MARKOS N

Plaintiff's right to proceed against the M.V. Markos N, *in rem*, to enforce its maritime lien for cargo damage against the M.V. Markos N is a distinctive remedy under U.S. maritime law administered exclusively by the U.S. federal courts, 28 U.S.C. 1333; *Hine v. Trevor*, 71 U.S. (4 Wall) 555 (1867); *Madruga* v. *Superior Court of California*, 346 U.S. 556 (1954).

The Federal Arbitration Act("FAA"), 9 U.S.C. § 1 *et seq.*, provides for arbitration of *in personam* claims, and does not eliminate the distinctive nature of *in rem* rights and remedies, but in recognition of those distinctive rights and remedies it preserves the *in rem* arrest and attachment practices under U.S. maritime law by operation of Section 8. This Honorable Court has held:

> "The intent of § 8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement. *The statutory provision does not contemplate 'the vessel or other property,' which may be seized, as being the party to the arbitration agreement.*" *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 275, 52 S.Ct. 166, 76 L.Ed. 282 ((1932). [emphasis added]

Petitioner was unaware of the arbitration clause at issue here, and commenced this *in rem* action under general principles of maritime law, not in connection with a contemplated arbitration proceeding between *in personam* parties pursuant to § 8 (ie. "the party claiming to

be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party . . .."). The proviso of § 8 that, "the court shall retain jurisdiction to enter its decree upon the award," certainly contemplates the separate nature of the *in rem* action and expresses no intention that the FAA completely extinguish the *in rem* claim.

Statutes in derogation of common law rights, or here, rights under the general maritime law, must be strictly construed so as to preserve the maritime rights unless the statute expressly eliminates such rights. *See*, *Jones v. The Flying Clipper*, 116 F. Supp. 386, 388-9 (SDNY 1953), cited with approval and followed in *Encyclopaedia Britannica, Inc. v. Hong Kong Producer*, 422 F. 2d 7, 1969 AMC 1741, 1757 (2d Cir. 1969); *and see*, *Densberger v. United Technologies Corp.*, 283 F.3d 110, 2002 U.S. App. LEXIS 3894 (2d Cir. 2002), where defendant sought reversal of a jury verdict on the grounds that the Connecticut Product Liability Act ("CPLA") preempted plaintiff's common law theories of liability:

> "As the Connecticut Supreme Court has recently held in relation to CPLA preemption of the common law, 'interpreting a statute to impair an existing interest . . . is appropriate only if the language of the legislature plainly and unambiguously reflects such an intent.' *Vitanza*, 778 A.2d at 840 (quoting *Ahern v. New Haven*, 190 Conn. 77, 459 A.2d 118, 121 (Conn. 1983)) (emphasis added) (holding that because the learned intermediary defense is not explicitly abrogated by the CPLA, it remains available under the statute). Because the CPLA does not expressly prohibit post-sale liability for negligent failure to warn, the negligence-based common law

duty survives and is cognizable under the statute." *Id.* at *10.

A. Doctrines of *Res Judicata* and Collateral Estoppel do not apply to bar the *in rem* claim.

Petitioner's timely filed *in rem* action against the vessel was not extinguished by the FAA, but rather survives the arbitration procedures, which resulted in no adjudication of Petitioner's *in rem* rights on the merits and could not have, as London arbitrators have no jurisdiction over *in rem* claims. Thus, principles of *res judicata* and collateral estoppel do not apply to bar determination of Petitioner's claim on the merits. *Res judicata* has been held not to apply as between *in rem* and *in personam* causes of action in *Central Hudson v. Empresa Naviera* 56 F.3d 359, 1996 AMC 163 (2d Cir. 1995). *Central Hudson* states:

> "When a litigant files consecutive lawsuits against separate parties for the same injury, the entry of a judgment in the prior action does not bar the claims against other potentially liable parties. *See United States v. Lacey,* 982 F.2d 410, 412 (10 Cir. 1992); *White v. Kelsey, 935* F.2d 968, 970 (8 Cir. 1991); *Gill & Duffus Servs. v. AM. Nural Islam,* 675 F.2d 404, 406-07 (D.C.Cir. 1982 *per curiam); McClelland* v. *Facteau,* 610 F.2d 693, 695 n. 1 (10 Cir. 1979); *see generally Restatement (Second) of Judgments* § 49 cmt. a (1982) (For preclusion purposes, 'the claim against others who are liable for the same harm is regarded as separate.'); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4407, at 52-53 ('A single plaintiff . . , has as many causes of action as there are defendants to pursue.'). Since Central Hudson's *in personam* claim against Empresa is dis-

> tinct from its claim against the Vessel *in rem*, and since the *in personam* claim has not been adjudicated, *res judicata* does not bar this action. *See Montana v. United States*, 440 U.S. 147." *Id.* 1996 AMC at 172.

Collateral estoppel is also not a bar to Petitioner proceeding with its *in rem* action here after dismissal of the London arbitration. *Central Hudson* states:

> "Collateral estoppel, or issue preclusion, bars the relitigation *of issues actually litigated and decided* in the prior proceeding, as long as that determination was essential to that judgment." *Id.* 1996 AMC at 174.

Moreover, collateral estoppel cannot apply from an *in rem* judgment to an *in personam* action where no jurisdiction was obtained over the *in personam* defendant. *Sherman v. Kirshman* 369 F.2d 886 (2d Cir. 1966). Conversely, no collateral estoppel can be applied from an *in personam* judgment to an *in rem* action where, as here, no jurisdiction existed over the *res* in London arbitration. Since the merits of Petitioner's claim were never reached in the London proceeding, neither *res judicata* nor collateral estoppel prohibits Petitioner's *in rem* claim for unseaworthiness of the M.V. Markos N to proceed in this court.

II. DISMISSAL OF PETITIONER'S TIMELY *IN REM* ACTION BECAUSE THE *IN PERSONAM* FOREIGN ARBITRATION WAS UNTIMELY VIOLATES COGSA's PROHIBITION AGAINST CLAUSES RELIEVING THE SHIP OF LIABILITY

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. § 1300 et seq., was enacted in 1936 "to define by law the rights and liabilities of water carriers and shippers in foreign commerce." See Uniform Ocean Bills of Lading—Hague Rules, H.R. Rep. No.2218, 74th Cong., 2d Sess. 1 (1936). By its terms, COGSA applies to "every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. § 1300. Because the bills of lading drafted by carriers had historically contained various clauses designed to insulate the carriers from liability for cargo damage—in conflict with the goals of COGSA—the statute sought to make bills of lading uniform and restricted a carrier's ability to avoid liability by inserting limiting or exculpatory clauses in the bill of lading, specifically clauses "relieving the carrier or the ship from liability." 46 U.S.C. § 1303(8). The inclusion of "the ship" in this statutory language recognizes an ocean-going vessel as a separate juristic entity responsible *in rem* for cargo damage under U.S. maritime law.

The essence of Petitioner's argument is that the *in rem* action against the ship was a separate and distinct action from claims against the shipowner *in personam*, and since London arbitrators do not have jurisdiction to adjudicate an *in rem* claim the ruling in London that the *in personam* claim was time-barred impermissibly relieved the ship of liability and should have no effect on the timely commenced *in rem* action.

The United States Supreme Court in *Vimar Seguros v. M/V SKY REEFER*, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed.2d 462, 1995 AMC 1817 (1995), recognized that where the choice-of-forum and choice-of-law clauses would result in a waiver of a party's rights to pursue statutory remedies they would be void as against public policy. *Id.* 515 U.S. at 540, 115 L.Ed 2d at 2330:

> ". . . [W]ere we persuaded that 'choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637,n. 19."

The *SKY REEFER* decision dealt with a foreign arbitration clause in a bill of lading, and this Honorable Court characterized foreign arbitration clauses as a mere subsect of forum selection clauses. A conflict among the courts has arisen over whether an *in rem* claim can properly be dismissed in favor of a foreign forum where the law of the foreign forum does not recognize *in rem* actions.

Several cases from various U.S. District Courts have denied motions seeking to dismiss *in rem* claims under foreign forum selection clauses where the foreign forum and law does not recognize *in rem* liability. Nor can there be any doubt that a true maritime lien arises under U.S. law due to cargo damage regardless of the non-liability of the ship's owner under the contract of carriage. *See, Albany Ins. Co. v. M/V Istrian Express*, 61 F.3d 709, 1995 AMC 2261, 2262 (9th Cir. 1995) ("A maritime lien exists for Albany's cause of action which sounds in tort and an *in rem* proceeding is therefore appropriate.")

In *Demsey v. S.S Sea Star*, 461 F.2d 1009, 1014-15 (2d Cir. 1972), Judge Medina held:

> "Every claim for cargo damage creates a maritime lien against the ship which may be enforced by a libel *in rem*. *Gilmore & Black, The Law of Admiralty*, Section 3-45 at 165 (1957). COGSA, Section 1303 (8) prohibits a shipowner from contracting out of this liability. The fact that the *Sea Star* was operated under charter to World Bulk does not affect the liability of the vessel." [citations omitted]"

The court in *International Marine Underwriters v. M/V Kasif Kalkavan*, 989 F. Supp. 498, 1998 AMC 765 (SDNY 1998), held that *in rem* claim should *not* be dismissed in favor of a Korean forum.

> "It is true that the remaining difficulty, *viz.*, plaintiff's inability under Korean law to bring an *in rem* action against the vessel, would appear to deprive plaintiff of one of the substantive rights expressly guaranteed by § 3(8). That section forbids 'any clause . . . in a contract of carriage relieving the carrier *or the ship* from liability . . . or lessening such liability,' 46 U.S.C. app. § 1303(8) (emphasis added), a clear reference to an *in rem* proceeding. That language would be rendered meaningless if an *in rem* action were viewed as a procedural device not protected under § 3(8) as interpreted by *Sky Reefer*. Nor is the Court persuaded by the Ninth Circuit's recent decision in *Fireman's Fund Ins. Co. v. Cho Yang Shipping Co., Ltd.*, 1998 AMC 583 (9th Cir. 1997), which reached the opposite conclusion, for the court there appears wholly to have ignored the above quoted statutory language that refers to the ship's own liability. *See id.* at 587." *Id. 1998* AMC at 767.

In *Allianz Ins. Co. of Canada v. Cho Yang Shipping Co.*, 131 F.Supp. 2d. 787, 795 (E.D. Va. 2000), the Court stated:

> "[I]t would be unreasonable and unjust to enforce the forum selection clause as to *D.S.R. America*, the *in rem* defendant, because an *in rem* action is unavailable under the forum law (Korea), and thereby reduces Allianz's rights under COGSA."

The District Court in *Tokio Marine & Fire Ins. Co. v. M/V Turquoise*, 2001 U.S. Dist. LEXIS 14689, 2001 AMC 1692 (D.S.C. 2001), adopted the same reasoning as set forth in *Kasif Kalkavan*, and denied the defendant vessel's motion to dismiss the *in rem* claim pursuant to a foreign (Korea) forum selection clause in the bill of lading. *And see*, *Hyundai Corp. U.S.A., Inc. v. M/V AN LONG JIANG*, 1998 U.S. Dist. LEXIS 254, 1998 AMC 854 (SDNY 1998) ("plaintiff is free to continue its suit *in this District* against the Chinese shipowner and the *in rem* vessel." [emphasis added] *Id.* 1998 AMC at 856.)

This principle is precisely set forth in *Karobi Lumber v. The Norco*, 249 F.Supp 324, 1966 AMC 315, 317, *aff'd* 397 F.2d 570, 1968 AMC 1524, 1527 (5th Cir. 1968), which was also a case involving cargo damage under bills of lading issued under a charter party which contained a "prohibition of lien" clause that also had the potential effect of precluding an *in rem* claim. The District Court held:

> "The injury complained of herein is based upon an allegation of breach of duty to provide a seaworthy ship.
>
> Since bills of lading issued pursuant to a charter party must conform to COGSA, a bill of lading cannot be subject to an agreement which violates COGSA. The lien prohibition clause contained in

the charter party agreement is unenforceable insofar as it attempts to insulate the vessel from liability for negligence in an action brought by a shipper who has a bill of lading. COGSA expressly prohibits such exemptions from liability in a contract of carriage. 46 U.S. Code, § 1303(8).

The fact that the exemption from liability does not expressly appear on the face of the bill of lading does not bring the clause from the charter party beyond the scope of COGSA. The bill of lading was issued subject to the charter party and the protective measures guaranteed by COGSA cannot be defeated by resort to extraneous agreements. It cannot be said that a bill of lading complies with the terms of COGSA when issued under a charter party if the bill of lading cannot guarantee the *in rem* liability of the vessel. *See Gilmore and Black, Admiralty* (1957) § 4-24, p. 219." *Id.* 1966 AMC at 317.

On appeal to the Court of Appeals by the ship, the Court affirmed, holding:

"The gist of the injury complained of in the present case is breach of duty to provide a seaworthy ship, and the evidence overwhelmingly sustains the lack of seaworthiness of the S.S. Norco. Dodds contended that *Compagnie De Navigation v. Mondial United Corp.*, 1963 AMC 946, 316 F.(2d) 163 (5 Cir., 1963), was governing. The general rule that a charter party can expressly restrict liability of the vessel is stated in that case. Such statement, however, must be qualified by the fact that the exemptions are permissible only so long as not rendered void by the statute. Therefore, even in view of the fact that Karobi had reason to know of the existence of a charter party, the lien prohibition clause con-

> tained in the charter party is unenforceable by virtue of the express provisions of 46 U.S. Code, § 1303(8).
>
> The judgment of the trial court is affirmed." 1968 AMC at 1527.

Similarly here, Petitioner sued the vessel *in rem* claiming unseaworthiness and a maritime tort. Since under U.S. law such a claim gives rise to a maritime lien against the vessel under COGSA, the fact that English law precludes such a claim renders the English proceedings void as to plaintiff's *in rem* claim.

Although the Federal Arbitration Act permits valid U.S. proceedings to be stayed pending foreign arbitration, U.S. Courts are required to scrutinize such proceedings to determine whether the parties' rights under U.S. law are protected. As noted by the U.S. Supreme Court in *Vimar v. M/V Sky Reefer, Id.* 1995 AMC at 1825:

> "Petitioner's second argument against enforcement of the Japanese arbitration clause is that there is no guarantee foreign arbitrators will apply COGSA. This objection raises a concern of substance. The central guarantee of § 3(8) is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by the Act. The relevant question, therefore, is whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." [citation omitted]

Under English law, the M.V. Markos N was not subjected only to "lesser" liability, but rather avoided liability altogether by the referral of the *in personam* claim to London arbitration after the statute of limitations had

expired. The result in this case violated § 1303(8) of COGSA because the ship was relieved of liability by operation of § 8 of the FAA. The conflict between these statutes that arose from this situation must be resolved by this Honorable Court to preserve the traditional *in rem* rights and remedies against a ship where a belated demand for arbitration renders the *in personam* claim time-barred in the foreign forum.

III. THE POLICY FAVORING ARBITRATION OF DISPUTES CONFLICTS WITH THE LAW'S SUBSTANTIVE *IN REM* REMEDIES WHERE, AS HERE, FOREIGN ARBITRATION WAS NOT PLEADED AND NOT ASSERTED PRIOR TO EXPIRATION OF THE STATUTE OF LIMITATIONS

In the Answer filed by Respondent M.V. Markos N, *in rem*, five affirmative defenses were raised: failure to state a cause of action, that the claim does not constitute a maritime lien, forum non conveniens, real party in interest, and the COGSA $500 per package limitation of liability. Respondent did *not* plead arbitration as an affirmative defense, did not seek to amend its pleading to include this defense, and did not plead that the terms of the bills of lading or the charter party referenced therein governed this dispute.

Rule 8(c), F.R.Civ.P., states:

> "(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and

> any other matter constituting an avoidance or affirmative defense. . . ."

The Second Circuit has interpreted Rule 8(c) to require that an affirmative defense be pleaded before it can be invoked in litigation. In *Doubleday & Co., Inc. v. Curtis*, 763 F.2d 495, 503 (2d Cir. 1985) the Court reversed a dismissal of a complaint on the basis of waiver which had never been pleaded by the defendant.

> "Moreover, the district court's actions run afoul of the procedural safeguards embodied in the Federal Rules of Civil Procedure. [citing Rule 8(c)] The rule is intended to notify a party of the existence of certain issues, and its mandatory language has impelled us to conclude that a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation. *See Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984)."

The lower court did not treat "arbitration" as an affirmative defense, criticizing *McDonnell v. Dean Witter Reynolds*, 620 F. Supp. 152, 155-6 (D.Ct. 1985), where leave to amend to assert the defense of arbitration was denied under Rule 15(a), F.R.Civ.P., stating:

> "This issue is critical because, under Fed.R.Civ.P. 8(c), the affirmative defense of arbitration must appear in the answer, and 'a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation.' . . . Thus, absent a ruling granting the motion for leave to amend, Fed.R.Civ.P. 15(a), the motions to compel arbitration and to stay cannot be granted; if the defense is not set forth in the answer, Dean Witter 'already waived the right to litigate the issue.' " [citations omitted].

Respondent's failure to plead the arbitration defense, and the lower courts' granting a stay pending arbitration nearly two years after suit was commenced was prejudicial as expedited discovery was conducted aboard the ship at Houston, and Respondent engaged the merits of this action when it filed a motion for partial summary judgment limiting its liability to $500 per package.

The language of Rule 12(b), F.R.Civ.P., is mandatory:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required . . ."

There was also nothing pleaded in Respondent's Answer that refers to or invokes the terms of the charter party or bills of lading either specifically or generally.

> "In determining whether general, non-specific language in the defendant's answer suffices to preserve an affirmative defense, an inquiring court must examine the totality of the circumstances and make a practical, commonsense assessment about whether Rule 8(c)'s core purpose—to act as safeguard against surprise and unfair prejudice has been vindicated." *Williams v. Ashland Engineering Co., Inc.*, 45 F.3d 588, 593 (1st Cir. 1995).

In *LPR v. Challenger Overseas*, 2000 WL 973748, 2000 U.S. Dist. LEXIS 9746, 2000 AMC 2887 (SDNY 2000), a forum selection clause defense was found to be included in an affirmative defense referring generally to the contract that contained the clause, which was not the case in the Respondent's Answer.

> "A party may waive a defense of improper venue by failing to raise it in the answer. See Fed. R. Civ. P.

> 12(b) & (h); *Rohrer v. FSI Futures, Inc.*, 981 F. Supp. 270, 274 (SDNY 1997). Similarly, any affirmative defense must be specifically set forth in a responsive pleading and failure to plead an affirmative defense in an answer results in waiver of that defense. See Fed. R. Civ. P. 8(c); *Satchell v. Dilworth*, 745 F.2d 781,784 (2d Cir. 1984)."

The lower courts did not safeguard Petitioner from surprise and unfair prejudice when it granted Respondent's motion on its unpleaded arbitration defense. Mr. Simon Golding, Thyssen's General Manager of Materials Logistics, attested that Thyssen was unaware of the London arbitration provision in the charter party referenced on the bills of lading despite requests to its shipper, Metalsrussia, for a copy of same, which were refused. Thyssen was familiar with other Western Bulk Carriers charter parties, and had chartered vessels previously from Western Bulk Carriers that contained Southern District of New York jurisdiction clauses for cargo damage claims, not London arbitration clauses. The element of surprise is clearly established by these facts.

Even more prejudicial was the Respondent's delay in raising the arbitration defense until after the one year time limit for suit under COGSA § 1303(6) had passed. This delay virtually guaranteed that the belatedly commenced arbitration in London would be dismissed for time-bar. By not raising arbitration as an affirmative defense in its Answer and waiting until the claim was time-barred in London before seeking arbitration, Respondent maneuvered Petitioner into an impossible dilemma. The lower courts erred by ignoring the procedural safeguards of the pleading requirements of the Federal Rules of Civil Procedure, and by finding no waiver in the circumstances of this case. *See, S&R Co. of*

Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998), where the issue of waiver was properly decided by the district court in the first instance.

Thyssen was also caused to oppose Respondent's motion for partial summary judgment on the limitation of liability and real party in interest defenses, and conducted discovery both in Texas where the vessel was boarded and in New York before motion practice that lead to the current result. This conduct of Respondent was contrary to an intention to arbitrate and when coupled with the delay beyond the COGSA time limit before raising arbitration, was prejudicial to Petitioner. See, *Com-Tech Associates v. Computer Associates International, Inc.*, 938 F.2d 1574 (2d Cir. 1991), where waiver was found when defendant failed to plead the defense, conducted discovery, and moved for partial summary judgment and judgment on the pleadings causing plaintiff prejudice.

CONCLUSION

Petitioner respectfully requests that this Honorable Court grant the Petition for Certiorari due to the salient issues of maritime law presented in this brief. Petitioner's *in rem* claim was erroneously dismissed in favor of a foreign forum that does not recognize such *in rem* claims and English arbitrators who cannot adjudicate *in rem* claims after the statute of limitations had run. This Honorable Court should reverse the lower court and remand for proceeding on the *in rem* claim in the United States Federal Courts.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2001

Argued: August 9, 2002

Decided: September 26, 2002

Docket No. 01-9044

THYSSEN, INC.,

Plaintiff-Appellant,

—v.—

CALYPSO SHIPPING CORP., S.A., A.M. NOMIKOS MARITIME AGENCIES, S.A., IN PERSONAM, M/V MARKOS N, Official Number 9897, her engines, boilers, tackle, equipment, appurtenances, etc., *in rem*,

Defendants-Appellees.

Before:

CALABRESI, POOLER, and SOTOMAYOR,

Circuit Judges.

Appeal from a grant of summary judgment and of a motion to confirm an arbitration award. Affirmed.

STEVEN P. CALKINS, Kingsley, Kingsley & Calkins, Hicksville, NY, *for plaintiff-appellant.*

RICHARD V. SINGLETON, Healy & Baillie, LLP, New York, NY, *for defendants-appellees.*

PER CURIAM:

BACKGROUND

Plaintiff-appellant Thyssen, Inc. ("Thyssen") contracted for a cargo of steel coils and the cargo's delivery to the United States with a Hong Kong company, Metalsrussia, on October 26, 1996. Delivery was to be completed by January 31, 1997. Metalsrussia arranged to ship the coils by subchartering the MARKOS N from Western Bulk Carriers, which had previously chartered the ship from its owner, Defendant-appellee Calypso Shipping Corp., S.A. ("Calypso").[1] The MARKOS N charter agreement (or charter party) between Metalsrussia and Western Bulk Carrier is at the center of this dispute.

Two bills of lading issued for Thyssen's cargo from an agent of Western Bulk Carriers on January 23 and 24,

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[1] Defendant-appellee A.M. Nomikos & Son Ltd. manages the ship.

1997, referencing the above-mentioned charter party. Both bills of lading contain, as the first condition of carriage, the provision: "All terms and conditions, liberties and exceptions to the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

When the coils arrived in the United States, they were damaged by rust. Despite the damage, Western Bulk Carriers was paid by Metalsrussia, which was in turn paid in full by Thyssen. The dispute now is between Thyssen and the vessel's owners and managers and the ship itself *in rem*.

Thyssen brought suit in the Southern District of Texas on March 5, 1997, which issued a warrant for the arrest of the MARKOS N and ordered expedited discovery to allow inspection of the vessel. In exchange for the release of the ship, Thyssen accepted a "Club Letter of Undertaking" from the vessel's insurer, which promised to pay up to $600,000 in the event of a final judgment for the plaintiff. The letter reserved all defenses.

The parties agreed to transfer the action to the Southern District of New York in August of 1997. On March 11, 1998, a little more than one year after the alleged damage took place, Calypso filed an answer on behalf of itself and the vessel. The answer raised a number of defenses, including a claim that its liability was limited to $500 per package under the Carriage of Goods by Sea Act ("COGSA"). The answer did not mention the arbitration clause. In November 1998, Thyssen, seeking to dismiss defendant's per-package defense, moved for partial summary judgment. In response, Calypso filed its opposition to Thyssen's motion and, arguing that the incorporated bill of lading required that disputes be resolved by arbitration in London under English law,

made a cross-motion to stay the proceedings pursuant to the Federal Arbitration Act.

The district court (Mukasey, *J.*) stayed the federal court proceedings. It found (1) that Thyssen's bill of lading incorporated the London arbitration clause of the MARKOS N charter party between Western Bulk Carriers and Metalsrus-sia; (2) that there was adequate evidence of the incorporation by reference of a written arbitration provision into the charter party; (3) that the charter party contained a "broad" arbitration clause sufficient to bind nonsignatories; (4) that Thyssen's *in rem* action against the vessel was arbitrable; (5) that Calypso had not waived its right to arbitrate the dispute by allowing the litigation to proceed; and (6) that whether Thyssen's claims were time-barred was a matter for the arbitrator to decide.

London arbitrators were appointed, but the parties agreed to allow the Commercial Court in London to decide whether or not Thyssen's claims were time-barred. (English law, like COGSA, includes a one-year time bar on damaged-goods claims.) That court decided that the claims were indeed time-barred and, finding that the delay was Thyssen's fault and doubting Thyssen's claims that it had tried and failed to obtain copies of the charter parties, refused to exercise its discretion under the English Arbitration Act to grant an extension. The Commercial Court thereupon dismissed Thyssen's claims in a decision that Thyssen did not appeal.

The case returned to the federal district court, which confirmed the arbitration award and finally disposed of all of Thyssen's claims. In so doing, the court turned aside arguments by Thyssen that (1) the arbitration was aborted and should therefore be voided pursuant to 9 U.S.C. § 10(a)(4), and (2) that since arbitrators have no *in rem* jurisidiction under English law, any contractual

clause purporting to force London arbitration of *in rem* claims would be void under COGSA, 46 U.S.C. § 1303(8).

Thyssen appeals these two decisions of the district court on four grounds: (1) Calypso waived arbitration by waiting as long as it did before raising its right to arbitrate. (2) Dismissal of Thyssen's *in rem* action against the MARKOS N deprived Thyssen of a remedy. (3) Requiring London arbitration of Thyssen's *in rem* claims violates COGSA § 3(8). (4) The arbitration clause in the charter party should not be enforced, because neither party to the bill of lading was a signatory of the charter party, and because Thyssen was unaware of the charter party's contents.

DISCUSSION

I. Waiver

We review *de novo* a district court's decision regarding waiver of a party's right to arbitrate, but we review the factual findings on which the district court relied for clear error. *See S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2d Cir. 1998).

"[T]here is a strong presumption in favor of arbitration[, and] waiver of the right to arbitration is not to be lightly inferred." *Coca-Cola Bottling Co. v. Soft Drink and Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001) (internal quotation marks omitted). "An inquiry into whether an arbitration right has been waived is factually specific and not susceptible to bright line rules." *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993). Generally, waiver is more likely to be found the longer the litigation goes on, the more a party avails itself of the opportunity to litigate, and the more that party's litigation results in prejudice to the opposing party. *Lead-*

ertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995).

The key to a waiver analysis is prejudice. "[W]aiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985). This Court has recognized two types of prejudice: substantive prejudice and prejudice due to excessive cost and time delay. "Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense." *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991).

In the instant case, it is clear that Thyssen did not face excessive costs. Though there was a significant length of time between the filing of the complaint and the assertion of Calypso's right to arbitrate, there was no evidence of extensive discovery or substantive motions by Calypso. This Circuit has refused to find waiver in a number of cases where delay in trial proceedings was not accompanied by substantial motion practice or discovery. *See, e.g., Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 122 (2d Cir. 1991) (holding there was no waiver even though defendant did not raise arbitration after knowing about his rights for three years); *see also Thomas v. A.R. Baron & Co.*, 967 F. Supp. 785, 789 (S.D.N.Y. 1997) (no waiver despite a year and a half of delay); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819, 830 (E.D.N.Y. 1995) (no waiver of arbitration by the defendant where the three-year delay was mostly due to motions presented by the plaintiff). Absent evidence of excessive cost, the presumption in favor of arbitration

cannot be overcome merely on the basis of the length of the delay.

In arguing substantive prejudice, Thyssen offers two theories. First, it contends that Fed. R. Civ. P. 8(c) requires all affirmative defenses, and arbitration in particular, to be pleaded in the answer. Accordingly, Thyssen cites *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152, 155-56 (D. Conn. 1985) (citations omitted): "[U]nder Fed. R. Civ. P. 8(c), the affirmative defense of arbitration must appear in the answer, and a party's failure to plead an affirmative defense bars its invocation at later stages of litigation . . . . [I]f the defense is not set forth in the answer, [the defendant] already waived the right to litigate the issue."

This argument runs afoul of the applicable precedent of this Court: "Absent a demonstration of prejudice by [the defendant], the bare fact that the defendants filed an answer is inadequate by itself to support a claim of waiver of arbitration." *Rush*, 779 F.2d at 889. While not pleading arbitration in the answer can be used as evidence towards finding of waiver, *see Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1577 (2d Cir. 1991), there is no *per se* rule that arbitration must be pleaded in the answer in order to avoid waiver. Moreover, nothing in the text of Fed. R. Civ. P. 8(c) calls the requirement of prejudice into question. Rule 8(c) does require a defendant to set forth any defense of "arbitration and award," but this is different from a motion to stay pending arbitration. Rather, it refers to a situation in which an arbitrator has already ruled. "Clearly, Rule 8(c) is limited to the situation where a dispute already has been arbitrated and an award has been obtained." *Lee v. Grandcor Med. Sys., Inc.*, 702 F. Supp. 252, 254 (D. Colo. 1988).

Thyssen's second argument is that it was substantively prejudiced by the fact that its claim was time-barred by the time arbitration was reached. But Calypso correctly responds that the applicable one-year limitation period had effectively expired before the defendant even answered. Thus, there was no substantive prejudice. We therefore agree with the district court's conclusion that there was no waiver. *Cf., e.g., Rush,* 779 F.2d at 887 (no waiver where there was "extensive involvement over the course of eight months in the litigation, including taking rather extensive discovery, bringing a motion to dismiss, and posing thirteen affirmative defenses to the amended complaint, all without raising the right to arbitration" but no prejudice was shown).

II. *In Rem* Claims

Thyssen makes two separate but related arguments regarding the refusal of the district court to entertain its *in rem* action against the vessel. First, Thyssen claims that its *in rem* rights, which it maintains are distinct and separable from its *in personam* rights against Calypso, were not and could not be adjudicated by the London arbitrators and hence should not have been made to depend on that arbitration. Second, Thyssen asserts that under COGSA § 3(8), 46 U.S.C. § 1303(8), its *in rem* rights could not properly be submitted to London arbitration.

A. FAA Section 8 Precludes Thyssen's *In Rem* Claim.

Thyssen argues that the district court erred in dismissing its *in rem* claim because the arbitrator ruled only on the *in personam* claim. English law does not grant arbitrators *in rem* jurisdiction, and, Thyssen argues, this means that the dismissal of the *in personam* claim should

have no bearing on its *in rem* action. Section 8 of The Federal Arbitration Act ("FAA"), however, addresses this concern directly, making clear that where there is an arbitration clause in a contract, *in rem* proceedings serve to provide a plaintiff with security while the *in personam* claim awaits arbitration. *See* 9 U.S.C. § 8. The very applicability of the FAA to maritime contracts rests on this point. Almost all maritime disputes generate both an *in personam* and an *in rem* claim; if plaintiffs were able to bring *in rem* claims in court after the failure of their *in personam* claims before an arbitrator, parties would have no incentive to arbitrate maritime matters.

The FAA provides that the Act applies to arbitration agreements in maritime transactions, which include "charter parties, bills of lading of water carriers . . . collisions, or any other matters in foreign commerce which, if the subject controversy, would be embraced within admiralty jurisdiction." 9 U.S.C § 1. All of these transactions give rise to *in rem* claims against ships. Section 8 of the Act explains clearly how such *in rem* claims must be handled:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then . . . the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Id. § 8. Under § 8, the plaintiff may seize the ship *in rem*, obtain a bond, and proceed with arbitration. If the plaintiff wins but cannot recover against the owner of the vessel, it can recover against the vessel itself. *See Diana*

Compania Maritima, S.A. v. The Subfreights of the S.S. Admiralty Flyer, 280 F. Supp. 607, 615 (S.D.N.Y. 1968). The *in rem* claim serves as a way of making sure that a plaintiff can recover if it wins in arbitration. Any interpretation of the FAA that allowed an *in rem* claim to proceed after the failure of an *in personam* claim would undermine the purpose of the Act with respect to maritime proceedings. All maritime contracts that called for arbitration of *in personam* claims could be sidestepped simply by bringing *in rem* claims. The FAA clearly states that it controls maritime transactions, and we must interpret it in a way that furthers that purpose.[2]

B. Referral of Thyssen's *In Rem* Claim to a London Arbitrator Does Not Violate COGSA § 3(8).

COGSA § 3(8) states that "[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods, arising from negligence, fault or failure . . . shall be null and void and of no effect." 46 U.S.C. § 1303(8). Thyssen argues that, given the London arbitrator's lack of *in rem* jurisdiction, the arbitration clause in the charter party operated as such a clause, and hence upholding the arbitrator's decision violates § 1303(8). Even assuming *arguendo* that the lack of an *in rem* cause of action could be considered a violation of COGSA (a ruling that would contradict most case law on the matter, *see, e.g.*, *Fireman's Fund Ins. Co. v. M.V DSR Atlantic*, 131 F.3d 1336, 1339-40 (9th Cir. 1998)), there was no violation in the instant case, because Thyssen's *in rem* rights *were* protected. Thyssen accepted from the owner of the MARKOS N a Club Letter of Undertaking

[2] We do not decide today the issue of whether admiralty claims *in rem* can ever survive the dismissal of *in personam* claims.

for $600,000 as full security for its claims. Had it won in arbitration and had the owner of the MARKOS N tried to avoid the court's order, Thyssen could have recovered against the Club Letter. A letter of undertaking replaces the vessel as the *res* and moots the question of the need for separate *in rem* claim. *See, e.g., Salim Oleochemicals, Inc. v. M/V Shropshire*, 169 F. Supp. 2d 194, 200 (S.D.N.Y. 2001); *Macsteel Int'l USA Corp. v. M/V Spar Two*, 00 Civ. 9663 (JSR), 2002 U.S. Dist. LEXIS 5127, at *4 (S.D.N.Y. Mar. 28, 2002); *Reed & Barton Corp. v. M/V Tokio Express*, 98 Civ. 1079 (LAP), 1999 U.S. Dist. LEXIS 1807, at *7, (S.D.N.Y. Feb. 22, 1999). It follows therefore that the district court was correct in its conclusion that § 1303(8) did not render the charter party's arbitration clause invalid.

III. Applicability of the Arbitration Clause to Non-signatories of the Charter Party Ignorant of the Charter Party's Contents

Thyssen does not dispute that it can be bound to arbitrate its claims by signing a document that incorporates another document by reference. Rather, it claims it had no actual or constructive notice of the terms of the charter party that was incorporated and hence that it could not be deemed to be a signatory of that agreement. For all of the reasons stated by the district court, we agree that the charter party provisions were properly incorporated into the bill of lading and that the charter party bound both Thyssen and Calypso.

CONCLUSION

Having reviewed all of Thyssen's claims and finding them to be without merit, we AFFIRM the district court's grant of summary judgment to the Defendant-appellees.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 6181 (MBM)

THYSSEN INC.,

Plaintiff,

—against—

M/V MARKOS N, official number 9897 her engines, boilers, tackle, equipment, appurtenances, etc., *in rem*, and Calypso Shipping Corp., S.A. and A.M. Nomikos & Son (U.K.) Ltd., *in personam*,

Defendants.

OPINION & ORDER

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MICHAEL B. MUKASEY, U.S.D.J.,

Plaintiff Thyssen, Inc., a steel importer, sues the vessel M/V MARKOS N in *rem,* and its registered owner, Calypso Shipping Corp., S.A. and A.M. Nomikos & Son (U.K.), Ltd., *in personam,* for alleged damage to a shipment of steel coils carried aboard the MARKOS N. In this Court's earlier opinion and order, No. 97 Civ. 6181, 1999 WL 619634 (S.D.N.Y. August 16, 1999), with which this opinion assumes familiarity, the Court stayed this action pending arbitration. Defendants now move to dismiss with prejudice. For the reasons stated below, the London Commercial Court's decision that Thyssen's claims are time-barred is confirmed, and the complaint is dismissed.

I.

After I stayed this action pending arbitration, *see* Opinion and Order, No. 97 Civ. 6181, 1999 WL 619634 (S.D.N.Y. August 16, 1999), Thyssen appointed its arbitrator, and defendants raised a statute-of-limitations defense. (Singleton Aff. ¶ 9, Ex. 6) By agreement, the parties submitted this threshold question to the Commercial Court in London. (Singleton Aff. ¶ 10) The issues presented to the Commercial Court were (1) whether Thyssen's filing in this Court suspended the

one-year limitation period so that the commencement of the arbitration in London was timely; and (2) whether the Court should exercise its discretion under the English Arbitration Act to extend time to commence the arbitration. (Singleton Aff., Ex. 8 ¶¶ 12, 23) The Commercial Court held that Thyssen's filing in this Court did not suspend the one-year limitations period for initiating arbitration, and that, accordingly, the arbitration claim was time-barred. (Singleton Aff., Ex. 8 ¶ 22) The Commercial Court refused to extend the time to commence the arbitration. (Singleton Aff., Ex. 8 ¶ 34) Defendants now move to dismiss the instant action with prejudice as a result of the Commercial Court's decision.

II.

Although defendants frame their motion as one to dismiss, I will treat it as a motion to confirm the arbitration award. *See Maidman v. O'Brien*, 473 F.Supp. 25, 27 (S.D.N.Y. 1979) (treating motion to dismiss as motion to confirm arbitration award). First, defendants state that "[t]his court should enforce the judgment of the Commercial Court as if it were an arbitration award." Second, both Thyssen and defendants rely on law relevant to the enforcement of arbitration awards pursuant to the Federal Arbitration Act ("FAA"). (*See, e.g.*, Def. Mem. at 7; Pl. Mem. at 6-7, 12-13) Finally, the arbitration clause is sufficient to satisfy the FAA's requirement that the parties agree that a judgment of the court shall be entered pursuant to the arbitration award. The clause provides that the decision of the arbitrators "shall be final." *See* 9 U.S.C. § 9 (1994); *Homes Ins. Co. v. RHA/Pennsylvania Nursing Homes*, 127 F. Supp. 2d 432 (S.D.N.Y. 2001) (discussing cases and concluding that an agreement that the arbitrators' decision would be

"final" coupled with federal substantive governing law is sufficient to satisfy § 9 of the FAA).

Thyssen argues that the arbitration was "aborted" and should be voided, and not confirmed, under Section 10(a)(4) of the FAA because "a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4) (1994). Thyssen appears to argue that an arbitration never took place because the appointed arbitrators never heard the merits of Thyssen's claims.

An agreement to arbitrate does not entitle a claimant to a decision on the merits of its claim. Arbitrators have the power to determine that a claim is time-barred. *See In the Matter of Arbitration No. AAA 13-161-0511-85 under Grain Arbitration Rules,* 867 F.2d 130, 133 (2d Cir. 1989) (finding that the agreement to arbitrate was broad and encompassed the question of the time bar). That the Commercial Court resolved the time-bar issue does not render the arbitration void. Section 12 of the English Arbitration Act permits a party to seek an order from the court extending the time to commence arbitration. Arbitration Act, 1996, ch. 23, § 12 (Eng.). In addition to the request for an extension of time, parties may, by agreement, submit to the Court the substantive issue of the time bar. (Keates Decl. ¶ 5) Here, the parties agreed to submit both issues to the Commercial Court rather than the arbitrators because, according to defendants, "a threshold ruling on these issues by the court rather than by the arbitrators would result in considerable savings of costs and fees." (Singleton Aff. ¶ 10, 11; *see also* Keates Decl. ¶ 5) Thyssen's claims were resolved pursuant to the established procedure of the English Arbitration Act by a "neutral third party" chosen by the parties "after a hearing at which both parties [had] the opportunity to be heard." *Black's Law Dictionary* 105 (6th ed. 1990) (defining arbitration).

Moreover, the Second Circuit has held that an arbitration is "mutual, final, and definite" as required by § 10(a)(4) of the FAA, if it "resolves all issues submitted to arbitration and determines each issue fully so that no further litigation is necessary to finalize the obligations of the parties." *Conntech Devel. Co.* v. *University of Conn.*, 102 F.3d 677, 686 (2d Cir. 1996) (quoting *Dighello* v. *Busconi*, 673 F. Supp. 85, 90 (D.Conn. 1987), *aff'd* 849 F.2d 1467 (2d Cir. 1988)). Here, the Commercial Court held that Thyssen's claims were time-barred, thereby fully resolving this threshold issue. No further litigation is necessary to finalize the obligations of the parties.

Thyssen argues also that, even if the Commercial Court's decision was "mutual, final, and definite," the arbitrators did not have *in rem* jurisdiction under English law, and therefore their decision disposed of only Thyssen's *in personam* claims against Calypso and A.M. Nomikos & Son. Thyssen asserts that it would violate United States law and policy, specifically § 3(8) of the Carriage of Goods by Sea Act ("COGSA"), to confirm the London Commercial Court's decision as to Thyssen's *in rem* claim. *See Vimar v. M/V Sky Reefer*, 515 U.S. 528 (1995) (pointing out that a court may refuse to enforce an arbitration award if it violates United States law or policy). Section 3(8) of COGSA provides that "[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability . . . arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." 46 U.S.C. § 1303(8) (1994). Specifically, Thyssen argues that the enforcement of the arbitration clause here would violate § 3(8)

because it would deprive Thyssen of its *in rem* claim against the vessel.

Under United States law, an *in rem* claim is an action "brought against the vessel itself as defendant." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 516 (3d ed. 2001). An *in rem* claim permits a plaintiff to arrest the ship. *See* Supplemental Rule C for Certain Admiralty and Maritime Claims. Here, Thyssen took advantage of the arrest procedures and initiated an arrest of the M/V MARKOS N in Texas. Defendants tendered and Thyssen accepted as security a letter that set forth an undertaking to pay up to $600,000 if a final decree was entered "against the M/V MARKOS N and/or the owners." (Singleton Aff. ¶¶ 2, 3, Ex. 2) Thyssen also had available the procedure set forth in Section 8 of the FAA, which provides for the seizure of a vessel prior to arbitration. *See* 9 U.S.C. § 8 (1994); *Diana Compania Maritima, S.A.* v. *Subfreights of the S.S. Admiralty Flyer,* 280 F. Supp. 607, 615 (S.D.N.Y. 1968) ("The purpose of Section 8 is to give an 'aggrieved' party the benefit of the security provided by jurisdiction *in rem* while preserving the right to arbitrate.").

The parties do not dispute that arbitrators do not have *in rem* jurisdiction under English law. (Keates Aff. ¶ 9; Fisher Aff. ¶ 4) However, under English law, Thyssen could have brought an *in rem* claim for the purpose of arresting the vessel pursuant to § 20(2)(g) of the Supreme Court Act of 1981. (Keates Aff. ¶ 6) Although such an *in rem* claim must be commenced in the Admiralty Court, (Fisher Aff. ¶ 6; Keates ¶ 8) the Admiralty Court would have enforced the arbitrators' award against the security obtained by the arrest of the vessel in the *in rem* proceedings. (Keates Aft. ¶ 10)

Thyssen argues that the *in rem* claim that exists pursuant to United States law is not merely a security

device used for the arrest of the vessel, but rather is a substantive claim guaranteed by COGSA against the ship. To support its argument that the loss of its *in rem* claim violates § 3(8) of COGSA, Thyssen cites *International Marine Underwriters* v. *M/V Kasif Kalkavan*, 989 F. Supp. 498 (S.D.N.Y. 1998), which found that the plaintiff's inability to bring an *in rem* action under Korean law—the law specified in the choice-of-law clause—deprived the plaintiff of one of the substantive rights expressly guaranteed by § 3(8). *Id.* at 499. The Court in *International Marine* relied on the text of § 3(8), which forbids lessening the liability of the carrier or the ship. The statute's reference to the liability of the ship was, according to the Court, "a clear reference to an *in rem* proceeding." *Id.; but see Reed & Barton Corp.* v. *M/V Tokio Express*, No. 98 Civ. 1079, 1999 WL 92608, * 3 (S.D.N.Y. 1999) (distinguishing *International Marine* on the grounds that the party had accepted a letter of security and that the Hague-Visby Rules, Art. III § 8, contain the same language).

However, the Ninth Circuit, in *Fireman's Fund Ins. Co.* v. *M/V DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1998), held that "the mere unavailability of *in rem* proceedings does not constitute a 'lessening of the specific liability imposed by (COGSA),' rather it presents a 'question of the means . . . of enforcing that liability.' " *Id.* at 1339-40 (quoting *Sky Reefer*, 515 U.S. at 534). Here, Thyssen fails to demonstrate that the loss of its *in rem* claim deprives it of anything more than an additional means of enforcing liability. Thyssen's *in rem* suit against the vessel is based on the same facts and is at its core the same claim as the *in personam* suit against Calypso, the vessel's owner, but merely attaches a different label to that claim. *Cf. Queen of the Pacific*, 180 U.S. 49, 53 (1901) (rejecting plaintiff's assertion that a contractual limita-

tion period applied to suits against the owner but not the ship, the Court wrote that "[t]he claim is in either case against the company, though the suit may be against its property"); Note, *Personification of Vessels,* 77 Harv. L. Rev. 1122, 1126 (1964) ("Thus, in all situations where the wrong occurs while the owner or his agent is in control of the ship, the *in rem* proceeding is today merely a procedural alternative to an action against the owner."). Furthermore, Thyssen used the arrest procedures and accepted a letter of security. (Singleton Aff. ¶¶ 2, 3, Ex. 2)

The cases cited by Thyssen to support the viability of its *in rem* suit do not alter this conclusion. In *Central Hudson* v. *Empreas Naviera*, 56 F.3d 359 (2d Cir. 1995), the Court reasoned that Empresa, under the bareboat charter, was not in privity with the vessel, and that therefore the previous *in rem* suit did not bar an *in personam* suit against Empresa. *Empresa* does not support the conclusion that a plaintiff is entitled to bring a subsequent *in rem* action against the vessel after an attempt to raise the same claim against the owner of that vessel *in personam* fails. *See Burns Bros.* v. *Central Railroad,* 202 F.2d 910 (2d Cir. 1953). Thyssen also quotes *Demsey & Assoc.* v. *S.S. Sea Star,* 461 F.2d 1009, 1014 (2d Cir. 1972), which states that "Section 1303(8) prohibits a shipowner from contracting out of" a maritime lien which may be enforced by an action *in rem*. However, in *Demsey*, the plaintiff could not maintain an *in personam* action against the owner because the owner did not authorize the bills of lading at issue. *Id.* at 1015. Thyssen here has failed to demonstrate any meaningful distinction between its *in rem* suit against the vessel and its *in personam* suit against the owner.

United States courts have consistently recognized *in rem* claims against vessels based on the legal fiction of personification of the vessels. *See generally*, Alex T.

Howard, Jr., *Personification of the Vessel: Fact or Fiction?* 21 J. Mar. L. & Com. 319 (1990) (summarizing courts' treatment of the theory of personification). However, Thyssen's attempt to circumvent the arbitration agreement, the policy favoring arbitration, and the London Commercial Court's decision, distorts and disserves the purpose of the legal fiction of personification, which is to "simplify the task of suit and collection against ship owners." *Cargill B.V.* v. *S.S. Ocean Traveler,* 726 F. Supp. 56, 61 (S.D.N.Y. 1989). Thyssen's *in rem* suit is simply another "means of enforcing liability" against Calypso, the owner of the MARKOS N. Therefore, the arbitration clause, and confirmation of the Commercial Court's decision as to all defendants, do not violate § 3(8) of COGSA. *See Sky Reefer,* 515 U.S. 528, 534 ("The difference is that between explicit statutory guarantees and the procedure for enforcing them, ...").

* * *

Thyssen's *in rem* claim against the vessel was governed by the broad arbitration agreement. Confirmation of the Commercial Court's decision does not violate § 3(8) of COGSA. The London Commercial Court's decision that Thyssen's claims are time-barred was "mutual, final, and definite," and is confirmed as to all defendants. The complaint is dismissed.

SO ORDERED:

/s/ MICHAEL B. MUKASEY
Michael B. Mukasey
U.S. District Judge

Dated: New York, New York
August 7, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 6181 (MBM)

THYSSEN INC.,

Plaintiff,

—against—

M/V MARKOS N, official number 9897, her engines, boilers, tackle, equipment, appurtenances, etc., *in rem*, and CALYPSO SHIPPING CORP., S.A. and A.M. NOMIKOS & SON (U.K.) LTD., *in personam*,

Defendants.

OPINION AND ORDER

APPEARANCES:

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MICHAEL B. MUKASEY, U.S.D.J.,

Plaintiff Thyssen, Inc. ("Thyssen"), a steel importer, sues the vessel M/V MARKOS N, its registered owner, Calypso Shipping Corp., S.A. ("Calypso") and A.M. Nomikos & Son (U.K.) Ltd.[1] (collectively, the "defendants") for alleged damage to a shipment of steel coils carried aboard the MARKOS N. Thyssen moves for summary judgment striking defendants' affirmative defense of a $500 per-package liability limitation. Defendants cross-move for a stay in the litigation pending arbitration in London or, in the alternative, for summary judgment limiting Thyssen's damages to $500 per package in accordance with the Carriage of Goods by Sea Act ("COOSA"), 46 U.S.C. § 1305. For the reasons stated below, defendants' motion to stay this action pending arbitration is granted, and Thyssen's and defendants' cross-motions for summary judgment are denied without prejudice.

I.

Thyssen, the purchaser of the steel coils at issue, contracted with Metalsrussia Corporation Ltd. ("Metals-

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[1] In its complaint, Thyssen describes A.M. Nomikos & Son (U.K.) Ltd. in general terms as having "owned, operated, managed or chartered M/V Markos N." (Compl. ¶3)

russia"), of Hong Kong, to supply and ship the coils from Russia to the United States. (Defs. Local Rule 56.1 Statement ¶ 1) Pursuant to that agreement, Metalsrussia chartered the MARKOS N from Western Bulk Carriers ("WBC"), a company from which Metalsrussia previously had chartered vessels. (Singleton Aff. Ex. 2 ("Buhl Decl.") ¶¶ 3, 8) Calypso time-chartered the MARKOS N to WBC pursuant to a charter party dated January 9, 1997 (the "Calypso/WBC time charter"). (Singleton Aff. Ex. 2D) As is customary in these types of transactions, when the cargo from Metalsrussia was received, WBC as carrier issued form bills of lading to Metalsrussia as shipper, naming Thyssen as consignee. (*Id.* Ex. 4)

Specifically, two bills of lading—one dated January 23, 1997, and the other January 24, 1997—were issued for the Thyssen cargo. (*Id.*) Each is on a standard form called a "COGENBILL," which, by its terms, is to be "used with charter-parties." (*Id.*) on its face, the bill of lading states that, "for conditions of carriage, see overleaf." (*Id.*) On the reverse side, or overleaf, the "Conditions of Carriage" provide in their first paragraph that "[a]ll terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated." (*Id.*) On the face of the bills of lading is a box with the form language "Freight payable as per CHARTER-PARTY dated. . . ." (*Id.*) The date typed in that box is January 18, 1997. (*Id.*) The bills of lading were signed by an agent of WBC, Barwil Agencies Ltd., "on behalf of [the ship's] Master" (*id.*), as authorized by Calypso in the Calypso/WBC time charter. (*Id.* Ex. 2D, cl. 42)

It is plain from the record that the charter party indicated by the January 18, 1997 date is one entered into by Metalsrussia and WBC (the "MARKOS N charter party"). On receipt of the bills of lading, noting the ref-

erence to a charter party, Thyssen requested a copy of that charter party from Metalsrussia but was refused. (Golding Decl. at 2) Whatever the rationale for Metalsrussia's, and, subsequently, WBC's refusal, or inability, to provide the relevant charter party, the result is that the MARKOS M charter party is not in evidence.

Defendants, however, who were not signatories to, nor ever in possession of, the MARKOS N charter party, have proferred the following evidence to establish the contents of that agreement. Defendants submit the affidavit of Fleming Buhl, an officer of WBC and a former employee of the charter brokerage firm Lorentzen & Stemoco, which represented WBC in its negotiation and execution of more than 36 charter parties with Metalsrussia. (Buhl Decl. ¶¶ 1, 4, 8) According to Buhl, the first charter party between Metalsrussia and WBC, the BELNOR charter party, provided the general terms for all subsequent agreements. (*Id.* ¶¶ 4, 5, 8) At issue is the typewritten arbitration clause of that charter party, which provides:

> This Charter Party shall be governed and construed in accordance with English Law and any dispute arising under this Charter Party or Bills of Lading issued hereunder to be referred to arbitration in London. One arbitrator to be appointed by the Owners and the other by the Charterers. In case of the two arbitrators not agreeing, an umpire to be appointed by them. The award of the two arbitrators of [*sic*] the umpire to be final and binding upon both parties. The arbitrators to be commercial shipping men and conversant with shipping maters.

(Singleton Aff. Ex. 2A, cl. 36)

After the BELNOR charter party, each subsequent charter party was "fixed" by a telex incorporating by ref-

erence the general terms of the charter party executed immediately prior to it, thereby creating a chain of references leading back to the BELNOR charter party. (Buhl Decl. ¶¶ 8, 11)[2] In the case of the MARKOS N charter party, a telex was sent incorporating the general terms of the NICHOLAS P charter party, and listing terms specific to the MARKOS N, including duration, price and loadport. (Singleton Aff. Ex. 2C) Buhl avers that the general terms of the NICHOLAS P charter party were identical to those of the BELNOR. (Buhl Decl. ¶ 11)

Although they did not raise it as an affirmative defense in their answer, defendants now seek to enforce the arbitration clause in the MARKOS N charter party as incorporated into the bills of lading. Accordingly, they request a stay of this action. Thyssen challenges defendants' request on five grounds. First, Thyssen claims that the charter party was not properly incorporated in the bills of lading. Second, it argues that, even if the arbitration clause was incorporated properly, defendants' failure to produce the charter party is contrary to the statutory requirement that an arbitration clause be in writing. Third, it asserts that defendants cannot enforce an arbitration clause of a charter party to which neither they, nor Thyssen, were signatories. Fourth, Thyssen contends that the arbitration clause is inapplicable to this action since it refers only to contractual disputes under the charter party, not to maritime torts brought *in rem* against the vessel. Finally, it argues that defendants have

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[2] To support this point, defendants submit also a telex with regard to the M/V NAVA AVRA, the ship chartered by Metalsrussia from WBC immediately after the charter of the MARKOS N. (Buhl Decl. ¶ 18) That telex fixes the NAVA AVRA charter party by reference to "the MARKOS N fixture." (Singleton Ex. H)

waived their right to arbitration by excessive delay in moving to stay this action.

II.

A. *Incorporation of the Arbitration Clause*

Thyssen asserts that the bill of lading does not properly incorporate the MARKOS N charter party on the ground that although there is reference to the charter party date, the document itself has not been made available even after it was requested. However, availability, or lack thereof, does not control incorporation. The incorporation of a charter party into the bill of lading depends on whether the references to the charter party are sufficient to give the holder of the bill of lading notice of its existence. Although "ideally" the incorporation clause should specify the date of the charter party, the names of the signatories and the place it was signed, *Continental U.K. Ltd.* v. *Anangel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809, 814 (S.D.N.Y. 1987), "where there is 'no confusion whatsoever concerning who in fact was the charterer on this voyage, or which charter party governed the rights of the charterer vis-a-vis the shipowner,' an incorporation clause may effect incorporation even though it does not contain the names of the signatories or the date or place of the making of the charter party." *State Trading Corp. of India* v. *Grunstad Shipping Corp.*, 582 F. Supp. 1523, 1524 (S.D.N.Y.) (quoting *Amoco Overseas Co.* v. *S.T. Avenger,* 387 F. Supp. 589, 591 (S.D.N.Y. 1975)), *aff'd without opinion,* 751 F.2d 371 (2d Cir. 1984). Thus, courts have found that references to the existence of a charter party as a "governing" document, *see State Trading Corp.*, 582 F. Supp. at 1524 n.2 (collecting cases), or incorporation clauses which state only the date of a charter party, *see*

Lowry & Co. v. *S.S. Nadir*, 223 F. Supp. 871, 874 (S.D.N.Y. 1963), are sufficient to incorporate charter parties.

Here, the parties to the referenced charter party are not in doubt. Thyssen not only contracted with Metalsrussia to ship its steel, but also requested a copy of Metalsrussia's standard charter party, having been put on notice that such an agreement existed and would be relevant to the transaction. Under these circumstances, Thyssen cannot argue now that it was unaware that Metalsrussia was a party to the MARKOS N charter party. Moreover, the bills of lading here explicitly incorporate the arbitration clause of the charter party, thus assuring that Thyssen had notice that any dispute arising under the bills of lading would be referred to arbitration. *See Amoco*, 387 F. Supp. at 593. In short, I find the existence of a specific charter party of a particular date, combined with the repeated references to the charter party on both sides of the bills of lading, are sufficient to incorporate all the charter party terms.

B. *Writing Requirement*

Next, Thyssen argues broadly that because the charter party has not been made available to it, there is no proof that the arbitration clause is in writing and, therefore, Thyssen cannot be bound by its terms. In support of its position, Thyssen cites *MCI Telecommunications Corp.* v. *Exalon Industries, Inc.*, 138 F.3d 426, 429 (1st Cir. 1998), for the principle that a written arbitration clause is the pivotal statutory requirement for binding parties to arbitration.

Thyssen is correct insofar as the Federal Arbitration Act ("FAA") requires "an agreement in writing" before two parties may be bound. 9 U.S.C. § 3. However, contrary to Thyssen's assertion, there is no requirement that

the written arbitration agreement be part of an integrated signed agreement. Indeed, as defendants note, the Second Circuit has found that a "fixture recap" of an agreement's main terms, which incorporates by reference a standard form charter, demonstrates sufficient meeting of the minds to create a binding charter party. *See Great Circle Lines, Ltd.* v. *Matheson & Company. Ltd.*, 681 F.2d 121, 126 (2d Cir. 1982) (holding that, even in the absence of a final written contract, the arbitration clause in the standard form contract satisfied the writing requirement of the FAA).

Here, in a telex dated January 15, 1997, the parties agreed, or "fixed," on the main terms of the charter for the MARKOS N. (*See* Singleton Aff. Ex. 2C) Specifically, the telex incorporated the general terms of the previous agreement between the parties for the charter of the NIKOLAS P, and listed the terms specific to the MARKOS N charter, such as the loadports, point of destination, freight rate and nature of the cargo. (*See id.*) Although the charter party for the NIKOLAS P is not in evidence, Buhl asserts, and Thyssen proffers no evidence to the contrary, that the NIKOLAS P charter party general terms were identical to those of the BELNOR charter party. (*See* Buhl Decl. ¶ 11) The BELNOR charter party is in evidence and contains the typewritten arbitration clause set out above. (*See id.* Ex. 2A) Accordingly, defendants have established adequately the existence of a written arbitration agreement in satisfaction of the FAA requirement.

The decision in *MCI* does not support a contrary result. In *MCI*, one of the parties challenged the very existence of a contract, not just the particulars of an arbitration clause within that contract. *See MCI*, 138 F.3d at 429. After reiterating the basic rule that under the FAA an arbitration agreement must be in writing, the

MCI Court found that the lower court had erred by not taking the "first and crucial step" of permitting the challenging party to present evidence in support of its position. *See id.* In the instant case, there is no doubt that a charter party between Metalsrussia and WBC existed: the charter brokers received commissions for the transaction (*see* Singleton Aff. Ex. 2F), the freight was paid and the goods delivered. Moreover, unlike the opposing party in *MCI*, Thyssen has had the opportunity to show that the contract did not exist or at least undermine the evidence that it did, or, more to the point, to test the existence of the arbitration clause.

C. *Binding Nonsignatories*

Having determined that the arbitration clause was incorporated into the bills of lading and was in writing as required, I turn to consider whether the arbitration clause encompasses disputes of nonsignatories. Notwithstanding the strong federal presumption in favor of arbitrability, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986). Accordingly, courts have "consistently drawn a distinction between arbitration clauses specifically identifying the parties to which it applies, and a broader form of arbitration clause which does not restrict the parties." *In re Southwind Shipping Co.*, 709 F. Supp. 79, 82 (S.D.N.Y. 1989). Thus, courts have held consistently that a "broad" arbitration clause governing "all disputes" arising under the charter covers even a dispute involving a nonsignatory. *Son Shipping Co.* v. *De Fossie & Tanghe*, 199 F.2d 687, 688 (2d Cir. 1952); *see Lucky Metals Corp.* v. *M/V AVE*, 95 CIV. 1726 (JSM), 1995 WL 575195, at *2 (S.D.N.Y. Sept. 28, 1995); *Kaystone*

Chemical, Inc. v. *Bow-Sun,* No. 88 CIV. 5859(MBM), 1989 WL 39498, at *3 (S.D.N.Y. Apr. 19, 1989); *Midland Tar Distillers* v. *M/T Lotos,* 362 F. Supp. 1311, 1314-15 (S.D.N.Y. 1973). By contrast, courts have held that a "narrow" arbitration clause, which typically provides that "disputes between owners and charterers" must be arbitrated, applies only to disputes between the particular parties identified in the clause. *Import Export Steel Corp.* v. *Mississippi Valley Barge Line Co.,* 351 F.2d 503, 505-06 (2d Cir. 1965); *see Sohtorik Shipping & Trading. Inc.* v. *Peter Cremer Befrauchtungskontor, GMBH. & Co.,* 502 F. Supp. 143, 144-45 (S.D.N.Y. 1980); *Production Steel Co.* v. *S.S. Francois L.D.,* 294 F. Supp. 200, 201-02 (S.D.N.Y. 1968).

The arbitration clause in this charter party is broad. Not only does it require arbitration of "any dispute" which "arises under" the charter party, but it also specifically requires arbitration of disputes arising under the bills of lading. To be sure, the second sentence of the clause appears to reserve appointment of the arbitrators to the owner and charterer, arguably limiting the scope of the clause to those two parties. But courts have interpreted similar language, not as a limitation, but as a reflection merely of the fact that the charter party involved two parties at the time of drafting. *See, e.g., M/T Lotos,* 362 F. Supp. at 1314-15. Further, the inclusion of the statement in the MARKOS N charter party that arbitration is required for "any dispute arising under this Charter Party *or Bills of Lading*" (*see* Singleton Aff. Ex. 4 (emphasis added)), anticipates the possible assumption of rights and liabilities by subsequent parties and demonstrates an intent to preserve and "expand[ ] the scope of that clause to embrace persons other than the [original signatories]." *Id.*

Thyssen's reliance on *Instituto Cubano De Establiza-cion Del Azucar* v. *T/V Golden West*, 246 F.2d 802 (2d Cir. 1952), and *Federal Insurance* v. *M/V Audacia*, No. 85 Civ. 2656(RLC), 1986 WL 574 (S.D.N.Y. Aug. 19, 1986), is misplaced. *Golden West* involved a narrow arbitration clause, not a broad one. *See Golden West*, 246 F.2d at 804 (holding that an arbitration clause that allowed "either party"—identifying the charterer and the shipper only—to compel arbitration did not bind the vessel owner). In *Audacia*, which involved an arbitration clause like the one at issue here,[3] the Court refused to enforce the clause on the ground that it was not properly incorporated into the bills of lading. *See Audacia*, 1986 WL 574, at *2.

Not so easily dismissed, however, is the *Audacia* Court's alternative ground for refusing to compel arbitration—namely, that

> [w]here a defendant-shipowner's chartered vessel has been subchartered pursuant to a subcharter clause requiring arbitration of any dispute arising under the subcharter, and the bill of lading issued by the master is explicitly made subject to all the terms, provisions, and conditions of the subcharter between the charterer and subcharterer . . . the shipowner cannot rely on and invoke the subcharter arbitration clause as a basis for a stay under 9 U.S.C. sec. 4 against the holder of the bill of lading "absent a further provision making the arbitration clause in the head charter applicable." 2A *Benedict*

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[3] The *Audacia* arbitration clause read in relevant part:

> This contract shall be governed by English law and any dispute arising hereunder is to be referred to arbitration in London—1979 Arbitration Act. One arbitrator to be nominated by Owners and the other by Charterers.

Id. at *3 n.2.

> *on Admiralty,* sec. 106 at 8-16 (6th ed. 1986). The rationale is that the shipowner is not a party to the subcharter.

Id. This aspect of the *Audacia* Court's decision, however, conflicts with *Coastal States Trading, Inc.* v. *Zenith Navigation, S.A.*, 446 F. Supp. 330, 338 (S.D.N.Y. 1977), in which the Court found a comparable arbitration clause sufficiently broad to encompass a dispute between a consignee and a ship owner. In providing a rationale for binding a nonsignatory, the *Coastal States* Court held:

> The fact that the provisions adopted in the bill of lading were terms of another contract, rather than standard provisions in a form book or the terms of legislation or international agreements, does not in any way detract from their legal significance as integral parts of the contract which is the bill of lading. As such they are binding upon the persons seeking to assert rights under the contract. . . . "Where terms of the charter party are . . . expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making claim for damages for the breach of that contract just as they would be if the dispute were between the [parties to the charter agreement]."

Id. at 339 (quoting *Son Shipping,* 199 F.2d at 688). In light of the case law cited earlier, I find this reasoning more persuasive than that in *Audacia. See Citrus Mktg. Bd. of Israel* v. *M/V Ecuadorian Reefer,* 754 F. Supp. 229, 231 (D. Mass. 1990) (noting that "the line of cases cited, and relied upon, in *M.V. Audacia* has been rejected by a contrary line of cases," including *Coastal States*). Accordingly, I find Audacia no barrier to binding

Thyssen and the defendants ~~to~~ the terms of the MARKOS N charter party as incorporated into the bills of lading.

Thyssen argues that the instant case should be distinguished from prior case law in that here, none of the parties signed the charter party. This distinction is immaterial, however, as both parties are contractually tied to the bills of lading and are bound by its terms. First, Calypso directed the time charterer, WBC, to sign the bills of lading on behalf of the ship's Master. (*See* Singleton Aff. Ex. D, cl. 42) Indeed, on the very face of the bills of lading, the signatures make clear that they were signed "[o]n behalf of the Master" (*see id.*, Ex. 4), making the shipper a signatory to the bills of lading and "liable *in personam* and the vessel liable *in rem* for any failure in the performance of the contract of carriage the bills evidenced." *Golden West,* 246 F.2d at 802. Next, as a holder in due course of the bills of lading, Thyssen is bound by its terms. *See Son Shipping,* 199 F.2d at 688 (inferring that the holder of a bill of lading consents to the terms of the charter when the bill incorporates the charter party by reference); *Amoco Oil Co.* v. *M/T Mary Ellen,* 529 F. Supp. 227, 229 (S.D.N.Y. 1981); *M/T Lotos,* 362 F. Supp. 1311, 1314 (S.D.N.Y. 1973). Binding Thyssen is particularly reasonable because, as consignee of the goods, it "stood in a direct contractual relationship with the goods' seller and thus must take the consequences of that seller's agreement with the carrier." *Bow-Sun,* 1989 WL 39498, at *4; *see Kanematsu Corp.* v. *MV GRETCHEN W,* Civ. No. 93-1437-ST., 1995 WL 774554, at *3 (D. Or. Sept. 27, 1994) (binding a consignee to the terms incorporated into the bill of lading and signed by its agent despite lack of evidence that the consignee had actual knowledge of the bill's terms); *see also Fisser* v. *International Bank,* 282 F.2d 231, 233 (2d

Cir. 1960) (stating that ordinary contract principles determine who is bound by written arbitration provisions). Moreover, Thyssen sues on the bills of lading, which explicitly incorporate the charter party's arbitration clause. Thyssen cannot pick and choose among the clauses of the bills of lading, selecting those that impose duties on the vessel and impose liability while avoiding those that establish the forum where that liability is to be determined. In sum, Thyssen has presented no basis to justify avoiding a valid, written arbitration clause which encompasses the disputes at issue.

D. *Tort or Breach of Contract*

In an effort to characterize this as an action not arising under the bills of lading and, presumably, one that is, therefore, not controlled by the terms of those agreements, Thyssen argues next that this is an *in rem* action arising from the vessel's tort. Given the broad scope of the arbitration clause at issue, however, that is a distinction without a difference. Section 8 of the FAA allows a party to obtain jurisdiction over a vessel by utilizing the arrest and attachment procedures provided by the Federal Rules of Civil Procedure. *See* 9 U.S.C. § 8. However, under that provision, the right to arbitrate all disputes, even those *in rem* against the vessel, is preserved. *See Diana Co. Maritima, S.A.* v. *Subfreights of S.S. Admirality Flyer,* 280 F. Supp. 607, 615-16 (S.D.N.Y. 1968) (holding that an arbitration panel may decide both *in personam* and *in rem* claims). Whether a "particular claim is arbitrable depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause." *In re Spill by the "Amoco Cadiz"*, 659 F.2d 789, 794 (7th Cir. 1981). If the allegations of the complaint "touch matters" covered by the arbitration agreement,

those claims must be arbitrated, regardless of the legal labels attached to them. *Collins & Aikman Prods. Co.* v. *Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995).

Here, Thyssen alleges that damage to the steel coils resulted from the carriage of those coils on the MARKOS N. The coils were carried pursuant to a contract of carriage, consisting of both the bills of lading and, by incorporation, the MARKOS N charter party, and any damage allegedly resulting from the carriage "touches matters" covered by the arbitration clause.[4] Nor are the cases cited by Thyssen to the contrary. Those cases involved either narrowly worded arbitration clauses or attempts to recast a contract claim as a tort to gain priority under the Ship Mortgage Act. *See All Alaskan Seafoods, Inc.* v. *M/V Sea Producer*, 882 F.2d 425, 429-30 (9th Cir. 1989) (holding that existence of a contract did not preclude a tort claim that would be entitled priority as a maritime lien under 46 U.S.C. § 953(a)(2)); *Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 182-83 (1959) (stating that an arbitration clause governing only cargo damage disputes does not encompass additional claims). None of these cases holds that a claimant can avoid a valid, broad arbitration clause by proceeding *in rem*, or by casting its claim as a tort.

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[4] At one point, defendants argue that the bills of lading do not form any part of the contract for carriage. This argument is without merit. The COGSA liability limitation defendants seek to enforce is established solely by operation of the General Paramount Clause of the bills of lading. (*See* Singleton Aff. Ex. 4) The MARKOS N charter party contains no alternative liability provision and, therefore, does not fully describe the rights and liabilities of the parties who signed that document. The inevitable conclusion is that the complete contract of carriage consists of both the charter party and the bills of lading, read in conjunction.

E. *Waiver*

Finally, Thyssen asserts that defendants waived any right to enforce arbitration because they waited almost two years to seek arbitration. I disagree.

Whether a party has waived its rights to arbitration is a "statutorily mandated inquiry" on motions to stay proceedings brought pursuant to § 3 of the FAA. *Doctor's Assocs., Inc.* v. *Distajo,* 66 F.3d 438, 456 (2d Cir. 1995). This inquiry is made to assure the court that "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3; *see Carcich* v. *Rederi A/B Nordie,* 389 F.2d 692, 696 (2d Cir. 1968) (deciding waiver issue where the defendant moved for a stay in proceedings); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.,* 126 F.2d 978, 989 (defining a party "in default" for purposes of § 3 as one "who, when requested, has refused to go to arbitration or who has refused to proceed with the hearing before the arbitrators once it has commenced" or who has waived its rights to arbitrate). Because of the strong presumption in favor of arbitrability, waiver of arbitration "is not to be lightly inferred." *Leadertex* v. *Morganton Dyeing & Finishing Corp.,* 67 F.3d 20, 25 (2d Cir. 1995) (citation omitted). Whether or not there has been a waiver depends on such factors as the time elapsed from the commencement of litigation to the request for arbitration, the amount of litigation (including exchanges of pleadings, any substantive motions and discovery) and proof of prejudice to the opposing party (including taking advantage of pretrial discovery not available in arbitration, delay and expense). *See id.; In re Application to Compel Arbitration Between S&R Co. of Kingston,* 159 F.3d 80, 83 (2d Cir. 1998). Only if there has been litigation pertaining to "substantial issues going to the merits" will a party be

deemed to have waived arbitration. *Doctor's Assocs.*, 66 F.3d at 457.

Here, the length of the litigation weighs slightly toward a finding of waiver. The original complaint was filed in August 1997 in the United States District Court for the Southern District of Texas, and transferred to this court in August 1997. Defendants filed their answer in March 1998, but did not assert arbitration as an affirmative defense. Indeed, defendants first mentioned the arbitration clause in this motion, filed in January 1999, some 20 months after the filing of the original complaint.

This factor alone, however, is not dispositive. *See China Union Lines* v. *American Marine Underwriters Inc.*, 458 F. Supp. 132, 136 (S.D.N.Y. 1978) (finding no waiver when the defendant failed to plead arbitration as an affirmative defense and the litigation had progressed for over one year). The standard is whether there has been litigation of "substantial issues going to the merits," a standard not met on the current record. Rather than involving "substantial issues," the parties' litigation activity has been relatively minor; the record shows no more than the filing of the original pleadings and the filing of the present motion. As for discovery, Thyssen has presented no evidence of the extent or nature of discovery, nor does it appear from the record that either party has participated in discovery beyond that necessary for the current motions. Thus, contrary to Thyssen's argument, the record does not evidence litigation pertaining to substantial issues going to the merits on a par with that found in *Leadertex* or, for that matter, found in any of the cases in which the presumption favoring arbitration was overcome. *See Leadertex,* 67 F.3d at 25-26 (finding waiver based on undue delay, failure to raise the arbitration defense in numerous pleadings and counter-

claims, taking advantage of discovery and economic prejudice to the other party); *see also Zwitserse Maatschappij Van Levensverzekering En Lijfrente* v. *ABN Int'l Capital Mkts. Corp.*, 996 F.2d 1478, 1479 (2d Cir. 1993) (per curiam) (finding waiver where a party engaged in discovery not available in arbitration); *Com-Tech Assocs.* v. *Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1577-78 (2d Cir. 1991) (denying a motion to compel arbitration where a party failed to raise arbitration as a defense, participated in 18 months of extensive discovery, and only raised arbitration in a motion for a judgment on the pleadings four months before trial). Nor has Thyssen shown any real prejudice resulting from the delay in asserting this defense. Under these circumstances, defendants cannot be found to have waived their right to arbitration.

III.

Thyssen asks that any order to stay these proceedings pending arbitration be conditioned on defendants' waiver of any statute of limitations defense.[5]

Thyssen's request presupposes that this court, not the arbitrator, has the primary power to decide whether the time bar alluded to is absolute or subject to equitable tolling. However, once a court has answered questions of arbitrability—threshold issues that must be decided by the court before any adjudicative power passes to the arbitrator—the court must refrain from deciding the validity of any asserted "defenses rather than [referring]

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[5] Thyssen does not identify the relevant time bar, nor does it allege that the time bar, if applicable, is absolute. However, because I find that any statute of limitations defenses are properly decided by an arbitrator and not by this court, the facts pertaining to the alleged time bar are irrelevant for the purposes of this decision.

their resolution to an arbitrator." *Conticommodity Servs., Inc.* v. *Philipp & Lion*, 613 F.2d 1222, 1224 (2d Cir. 1980); *see AT&T Techs.*, 475 U.S. at 649-50. In determining whether an arbitrator or a court should adjudicate a particular claim or defense, the dispositive question is whether the parties have agreed that an arbitrator should decide the issue. *See Abram Landau Real Estate* v. *Benova*, 123 F.3d 69, 72 (2d Cir. 1997). Nevertheless, the Second Circuit has determined that "the validity of time-bar defenses to the enforcement of arbitration agreements should generally be determined by an arbitrator rather than by the court." *Conticommodity Servs.*, 613 F.2d at 1224; *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568, 571 (2d Cir. 1968) (holding that "all questions of delay which relate to issues which the parties have agreed to submit to arbitration . . . [should] be resolved by the arbitrators, not the court"). Moreover, if there are "any doubts concerning the scope of arbitrable issues [they] should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

Here, the threshold issues of arbitrability have been decided. The parties are bound by a valid arbitration agreement that covers the subject matter of the underlying claim. *See AT&T Techs.*, 475 U.S. at 649 (establishing that the determination of the scope of an arbitration clause is an "arbitrability" issue presumptively reserved for the courts); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (deciding the "arbitrability" issue of who was a party to a valid arbitration agreement). The parties' "broad grant of power to the arbitrators is unqualified by any language carving out" threshold issues to arbitration "(with or without

specific reference to timeliness) for resolution by the courts." *Painewebber Inc.* v. *Bybyk*, 81 F.3d 1193, 1200 (2d Cir. 1996). Thus, Thyssen is unable to overcome the presumption that "*any* dispute arising under [the] Charter Party or Bills of Lading," including associated procedural defenses, is to be arbitrated. (Singleton Aff. Ex. 2A, cl. 36 (emphasis added)); *see Painewebber Inc.* v. *Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) ("We believe that parties who have agreed to arbitrate a given subject most likely intend and expect that the arbitrator should resolve all issues that arise concerning that subject; if they do not, we think they would clearly express their contrary intent."); *AT&T Techs.*, 475 U.S. at 650 (stating that a presumption that a grievance is to be submitted to arbitration "is particularly applicable where the [arbitration] clause is . . . broad"). If a "claim is untimely, [plaintiff's] remedy is to defend the arbitration action on timeliness grounds, not to enjoin arbitration altogether" or to seek other equitable relief from this court. *Bybyk*, 81 F.3d at 1200; *see Worldcrisa Corp.* v. *Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997) (restating principle that § 3 of the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed" (internal quotation marks and citation omitted)).

The two cases relied on by Thyssen are easily distinguished as neither deals with the enforcement of an arbitration clause. *See Farrell Lines* v. *Ceres Terminals Inc.*, 161 F.3d 115, 117 (2d Cir. 1998) (holding that a district court sitting in admiralty has the power to issue injunctions); *Calvaro Growers* v. *Generali Belgium*, 632 F.2d 963, 968 (2d Cir. 1980) (recommending that dismissal of a case on *forum non conveniens* grounds be conditioned on the parties' submission to the jurisdiction of the for-

eign court and waiver of any statute of limitations defenses). Even if *Farrell Lines* could be read, as Thyssen encourages, for the general proposition that a district court sitting in admiralty has the same equitable remedies as in non-admiralty cases, such general powers never supersede the specific requirements prescribed by a governing statute such as the FAA. Accordingly, because the parties agreed to arbitrate "any dispute" arising under the charter party or the bills of lading, the application of any time bar is a matter for an arbitrator and not for this court.

* * *

For the reasons stated above, defendants' request for a stay pending arbitration is granted, and Thyssen's and defendants' cross-motions are denied.

SO ORDERED:

/s/ MICHAEL B. MUKASEY
Michael B. Mukasey
U.S. District Judge

Dated: New York, New York
August 12, 1999